Supreme Court, U.S.
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981413 MAR 1 - 1999
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NO.

IN THE

Supreme Court of the United States

October Term, 1998

DALE D. HOFFMAN,

Petitioner

vs.

WILLIAM S. COHEN,
SECRETARY OF DEFENSE,

E. GORDON STUMP, ROBERT V. TAYLOR,
GREGORY JOHNSON, DANNY D. JORE,
AND THE DEPARTMENT OF MILITARY
AFFAIRS OF THE STATE OF MICHIGAN,

Defendants/Appellees

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dale D. Hoffman
(Appearing pro se)
841 Lakeview Ave.
Port Huron, MI 48060
(810) 984-3768

54pp

Issue I: Whether a federal scheme through which a State official, the State Governor, through his appointed Adjutant General, exercising exclusive control, without federal redress, of members of a reserve component of the United State Army is fundamentally incompatible with our constitutional system of dual sovereignty.

Issue II: Whether a regulation published by the Department of the Army to promulgate a federal statue, the effect of which is to invest in State officials the responsibility to enforce a federal regulatory program, violates the Federal Constitution by abrogating the exclusive powers of the President to enforce the laws enacted by Congress and to act as the Commander-in-Chief of the Nation's Armed Forces.

Issue III: Whether a challenge to the constitutionality of a scheme whereby State officials enforce a federal regulatory program is justiciable as a matter of law.

Issue IV: Whether the trial court erred as a matter of law by dismissing with prejudice the Complaint in this matter pursuant to Federal Rule of Civil Procedure 12(b)(6) when the causes of action pled and the issues presented concern complex issues of Michigan law not decided by any Appellate Court.

Issue V: Whether the trial court erred as a matter of law by ignoring State statutory jurisdictional prerequisites imposed by the Michigan Code of Military Justice.

Issue VI: Whether the trial court can legally exercise jurisdiction to consider claims seeking a Writ of Mandamus and/or Declaratory relief under Michigan law.

Issue VII: Whether the trial court erred as a matter of law by dismissing Sergeant Hoffman's claims brought under the administrative Procedures Act when the Michigan regulation employed to administer non-judicial punishment upon him was not published properly under the Act as required by the Michigan Code of Military Justice and the Act provides that such a regulation improperly published is invalid.

LIST OF PARTIES

Federal Respondents	Party Served Notice
William S. Cohen	Secretary Of Defense William S. Cohen 1000 Defense Pentagon Washington D.C. 20301 (703) 545-6700
	Solicitor General of the United States Room 5614 Department of Justice 950 Pennsylvania Ave. N.W., Washington D.C. 20530
State Respondents	(for)
E. Gordon Stump Robert V. Taylor Gregory Johnson Danny D. Jore and the Department of Military Affairs of the State of Michigan	Michigan Attorney General Michael C. McDaniel (p-34738) Tort Defense Division P.O. Box 30217 Lansing, MI 48909 517) 373-6096

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JURISDICTION

The date on which the United States Court of Appeals decided my case was **DECEMBER 2, 1998**. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28. U.S.C. 1254.

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FORMER LEGAL COUNSEL

Richard P. Diehl (P35493), 650 E. Big Beaver, Ste. B, Troy, MI 48083-1432, (248) 528-2327.....6-18

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The Case is from the Federal Courts.

The opinion of the United States Court of Appeals appears at Appendix **A** to the petition and is **UNPUBLISHED**.

The opinion from the United States District Court appears at Appendix **B** to the petition and is **UNPUBLISHED**.

I have been denied the Constitutional right of redress and petition the Supreme Court of the United States for adjudication as I have found no avenue within governmental structures to pursue a remedy. Formerly a federal soldier, serving full time in the Active Guard and Reserve program in the Michigan Army National Guard. I have been denied the right of redress to the federal military as I was not serving within a command of the federal military. I have been denied redress through civilian channels as it is perceived to be an internal military matter.

STATEMENT OF THE CASE

If this honorable court so chooses, please adjudicate, reverse and remand as it finds necessary. For purposes of brevity and clarity I have outlined the three intents of the Plaintiff, (as to this Court) which is to achieve the end result of:

1. Settle the controversy among the lower courts of whether the National Guard has concurrent State and Federal powers or is either in a State status or a Federal status as the situation dictates.

While one court asserts the National Guard is a hybrid having simultaneous State and Federal powers, another asserts the National Guard is either in a Federal status or a State status, never both. In the generally practiced hybrid concept State officials are able to mix specific ingredients of State and Federal powers to create an untouchable immunity defense within the judicial system, eliminating accountability, abusing the public trust, and achieving the categorical ability to obstruct the due administration of justice. Incidentally, such an argument assumes the Governor of Michigan and the President of the United States have joint command and equal powers.

2. Can State officials, operating under the authority of State law, under the command of the Governor be granted Federal immunity in the Federal court system to avoid legal challenges to State law, circumventing State law, State courts,

the State legislature, and the Commander-in-Chief the Governor?

In this case the Michigan Attorney General argues Federal immunity in the Federal Court system to avoid challenges to State law and redress of wrongs pertaining to actions of State officials. Such a process usurps the powers reserved for State government.

3. Can a State or Federal court refuse to hear a case involving a member of the U.S. Armed Forces claiming the matter internal military discipline when the preponderance of issues occurred prior to any such labeling and when the specific disciplinary charge is not challenged?

The military disciplinary code has evolved from its original intent to a system where the overwhelming majority of its utilization is for political inquisitions. The National Guard and to some degree all the armed forces have found great success as to the ulterior motive of assigning occurrences of conflict, tension, and whistle blowing as disciplinary matters to obstruct the due administration of justice. It serves several advantages, to include: dissuades civilian court involvement as they are discouraged from intervening in internal military disciplinary decisions, support from elected officials is drastically undermined, resorting to media publicity is hampered by the introduction of embarrassing situations, it allows for leadership by intimidation setting an example for others, and when such defining is applied separation pay from the Armed Forces is not granted. For these reasons, the corrupt practice of defining or inventing disciplinary matters has become an explosive epidemic throughout the military, and standard procedure in the Michigan National Guard.

BACKGROUND OF EVENT

Beginning: **(Prior to any allegations of wrongdoing)**

A history of conflict and ostracism existed between SFC Dale Hoffman (Plaintiff) and his supervisor MSG Jore largely as a result of Jore's prejudicial views. One such example: Dale Hoffman repeatedly refused to attend routine visits to a hunting

camp official named the KKK composed of members of the Michigan National Guard assigned to State Headquarters. At the camp repulsive and illegal activities were known to occur. His supervisor MSG Jore was host. Contributing to the ostracism, as a result of his military duties, Dale Hoffman had alerted and assisted the FBI with information internal to the National Guard, in regards to the Oklahoma Federal Building. This was not views of anti-establishmentism, but far more substantial. The bomb control center asserted the matter was urgent. The FBI has a record of the matter.

Subsequently: **Dale Hoffman was informed repeatedly he was to lose his full time position as a recruiter, as there was a need to fill his position with an African American, which did occur.**

Having a valid equal opportunity complaint, and believing this to be a criminal violation called unlawful separation under the Michigan Code of Military Justice Dale Hoffman pursued the matter through the chain of command to include the State Command Sergeant Major, In addition, the Inspector Generals office, whom was instructed not to intervene, and Congressman Bonnior of which he received written reprimand for going outside the chain of command.

Response: After voicing strong opposition to their scheme, Dale Hoffman was eventually charged with violations under the Michigan Code of Military Justice in regards to finding lost property. Although initially no wrong doing was found, the command commenced reinvestigations until feigned violations were brought forward. At the separation hearing Dale Hoffman was informed six times BG Taylor would not allow a Court Martial. BG Taylor directed that Dale Hoffman would be separated from the military under the category of "Moral Derelict." Dale Hoffman understood the situation to be an ultimatum, of either concur to the previous demands of resignation, or face a separation as a "Moral Derelict." Against his will Dale Hoffman did resign. In addition to harsh

punishments, BG Taylor ordered that Dale Hoffman withdraw the equal opportunity complaint. Dale Hoffman did not agree then, or ever to its withdrawal. He was then instructed to resubmit the complaint, which MG Stump the Adjutant General refused to honor.

The lost property was nothing more than a red herring. Dale Hoffman volunteered to attend an off duty Explorer outing in lieu of attending the KKK hunt camp activities planned for that weekend. During the outing a civilian adult found a misplaced wallet. This individual indicated he was a law enforcement student and had just discussed the proper procedure in his class. He argued he was the rightful owner, however he had to give public notice and return it if the owner could be located. The identification in the wallet did not contain a residential address, nor was the owner from the United States. Dale Hoffman was not aware of any funds within the wallet, however he felt morally obligated to insure everything was done that could be done. Dale Hoffman insisted he be allowed to find the owner, and repeatedly informed the group if any money was missing they would have to return it. Dale Hoffman voluntarily at his initiative successfully polygraph tested when doubted as to the last statement.. Immediate steps were taken as Dale Hoffman did not wish to be the third soldier in separate incidences terminated over a lost wallet. The final investigation completed was a logical, but untrue compilation of misconstrued sound bites. Dale Hoffman was refused a rebuttal to the so called investigation. He was not even allowed an oral explanation at the separation hearing as BG Taylor declared "I don't care."

ERRORS OF THE LOWER COURTS

The 6th Circuit Court of Appeals judgment was in error. The court refused the case claiming internal military discipline, when the charge was not even challenged. The Courts refused to address the issues that had no relationship to allegations of misconduct. The courts erroneous understanding of the situation inferred use of assumptions rather than fact. Some examples

include: The court assumed Dale Hoffman was an Eagle Scout in the Boy Scouts of America, however he has never been an Eagle Scout, nor a Boy Scout. The court assumed the unit sponsored the Explorers, this is untrue. The court assumed Dale Hoffman participated in a split of money, rather he received a donation for food, in a different setting, and it was a routine practice. The court assumed the inappropriate handling of a situation is a charge under military code, when no such violation exists, even if he was under the jurisdiction of the code. The court assumed Dale Hoffman violated an order, when in fact no such order was given as he was informed the matter had been dropped. The court assumed the investigations, punishment, and refusal of due process were actions of AGR officials, as they were not. The court assumed he withdrew the equal opportunity complaint and willingly chose to resign. Neither are True. If Dale Hoffman had been challenging the specific charge, such details would have not been left to the courts assumptions.

The courts consistently take the approach they will not intercede in National Guard matters and as typical accepted the disciplinary bait as justification for refusal. As legal counsel expressed:

> "As you read this opinion two things should jump out at you. First factually they did not understand the difference between Federal (National Guard of the United States) status and State(National Guard) status. Second, you see nowhere in the discussion an analysis of the Supreme Court's teaching in Printz v. United States, New York v.United States. In New York and Printz, the Supreme Court held that it is unconstitutional for Congress to require States or State officials to regulate and administer Federal regulatory programs because it violated the fundamental principle of dual sovereignty. In Printz, Justice Scalia went further to state that it is also unconstitutional under Article II Sections 2 and 3 for Congress to so task State officials because the Constitution requires that the exclusive authority to enforce the laws enacted by Congress

is that of the President directly through or through the officials appointed by him. Justice Scalia went further to state that it does not matter whether the States agree, or the President agrees, to the shifting of the enforcement authority, it is unconstitutional. Peprich addressed the distinct legal difference between the National Guard and the National Guard of the United States. As you can see from the briefs I submitted, I posed your arguments in terms of theses three binding precedents, but the 6th Circuit does not even mention them or try to distinguish them."

Not only does the 6th Circuit Court, and other Circuits choose to ignore these binding Supreme Court precedence of Perpich, New York, and Printz, but likewise the U.S. Army delegating its Federal powers to the National Guard in the administering of its Federal Active Guard and Reserve Program (AGR). The Courts here are in agreement AGR soldiers are Federal troops.

ARGUMENTS

As presented before the 6th Circuit Court of Appeals by legal counsel Richard P. Diehl (P35493). No. 97-2177

ISSUE 1: Whether a federal scheme through which a State official, the State Governor, through his appointed Adjutant General, exercising exclusive control, without federal redress, of members of a reserve component of the United States Army is fundamentally incompatible with our constitutional system of dual sovereignty.

The U.S. Supreme Court held in Printz, supra:

"We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal government may neither issue directives

> requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. (emphasis added)."

The "organized militia" of the State of Michigan is as separate and distinct legally from the National Guard of the United States, a reserve component of the U.S. Army, as the Michigan Government is separate and distinct from the Federal Government. Citizens of the State of Michigan are also citizens of the United States but the Governor of Michigan can not be charged with enforcing those laws of Congress directed at the citizens of the United States.

The Federal Constitution established a system of dual sovereignty (Gregory v. Ashcroft, 501 U.S. 452, 457, 111 S.Ct 2395, 115 L.Ed. 2d 410 (1991). The constitution contemplates that a State's government will represent and remain accountable to its own citizens (New York, at 112 S.Ct 2424). As Justice Scalia discussed in Printz, at 117 S.Ct. 23,78 the separation of the two spheres of governmental function is one of the Constitution's structural protections of liberty. Justice Scalia repeated from Gregory, 111 S. Ct. 2400, a quote from Madison, to-wit:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. The Federalist No. 51 at 323.

Justice Scalia then stated:

> "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no costs to itself--the...officers of the 50 States."

In this case, there is the Michigan Adjutant General and his appointed Assistant that seemingly answers to no one, in large part because those State officials attempt to straddle the distinct line between the State and Federal sovereigns under the guise that the National Guard is a "hybrid." Those State officials ignore the plain mandates of State law that creates the appointive offices they occupy. They ignore basic legal precepts such as jurisdictional requirements imposed by the Michigan Code of Military Justice. They issue rules and regulations internal to the Michigan "organized militia" and ignore the Legislature's mandate that they comply with the public notice/hearing requirements of the Administrative Procedures Act. Under the guise of non-judicial punishment for a "minor crime" they impose punishment on a Federal soldier that is five (5) times that which a general court martial could impose if that soldier were within the jurisdiction of the Michigan Code and had been found guilty of a major offense. There is seemingly no one who can challenge the autocratic system theses Defendants choose to perpetuate. That is not the "double security" that Madison envisioned.

Under the Michigan Constitution and the Military Act the Governor is the Commander-in-Chief of, and the only civilian that can command, the Michigan "organized militia." The Michigan Legislature created the appointed office of Adjutant General and vested in that State official certain powers and authority confined to the Michigan "military establishment: (MCL 32.700, add B, pgs. 22-23) which the Legislature defined as the "Organized militia of the state" (MCL 32.505(1), Add. B, pg. 15). The Michigan legislature did not vest in that appointed official any powers and authority outside the State of Michigan -- that body is without Constitutional authority to act in the Federal sphere precisely because of the dual sovereignty embodied in the Federal Constitution. The Michigan Legislature has deemed that the Adjutant General is to wear the rank of major general within and

to command the Michigan "military establishment," not members of the Reserve Components of the U.S. Army (MCL 32.700, Add. B, pgs. 22-23)...They have no part in the Federal force structure. They are paid by the State of Michigan and serve only the State of Michigan under the mandates of the Legislature and the directions of the Michigan Governor, who can replace them at any time for any lawful reason or, indeed, for no reason at all.

In short, there are two distinct and separate organizations involved here -- the Michigan "organized militia" in which the Governor and the Adjutant General and his Assistants are integral parts and the Reserve Components of the U.S. Army of which the Michigan Governor and the Adjutant General and his Assistant are not a part. That part belongs to the President of the United States who acts through his Secretary of Defense, Secretary of the Army and federal Armed Service commanders. A State Governor or the officials he appoints have no authority to interfere in or engage in activities in a federal sphere. Indeed, as Printz, New York, and Gregory, supra all teach, the Federal Government may not interfere or direct the State organization or even task or allow its officials to act within that federal sphere. The Adjutant General and his Assistants have no legal authority outside of Michigan. AS Printz teaches, NGR 600-5 (Add. B, pgs. 63-91) and 32 U.S.C. 502(f)(Add. B, pg. 62) must be deemed unconstitutional to the extent that they vest in or task State officials to regulate a federal program -- in this case, the Federal AGR program. This is a legitimate case and controversy that should not have been dismissed pursuant to FRCP 12(b)(6).

ISSUE II: Whether a regulation published by the Department of the Army to promulgate a federal statute, the effect of which is to vest in a State Official the responsibility to enforce a federal regulatory program, violates the Federal Constitution by abrogating the exclusive powers of the president to enforce the laws enacted by Congress and to act as the Commander-in-Chief of the Nations Armed Forces.

The teaching of Printz and New York, supra instruct as well that there is a second constitutional element at issue here -- the separation and equilibration of powers of the three branches of the Federal Government. Few would argue the Constitutional infirmity of a scheme whereby Congress might enact a law to vest in the Governor of the State of North Carolina control of the U.S. Army's vanguard 82nd Airborne Division simply because that division is garrisoned in that State. Most would consider any Congressional scheme to so shift control of the Federal Government to be absurd, be it ordinary citizen or Constitutional scholar....However, when it comes to the National Guard those same individuals who laugh at wholesale shifting of the exclusive federal powers to the States are asked to accept such a shift because, it is argued, the National Guard is different, a hybrid.

Justice Stevens in Perpich v. Department of Defense, (110 S.Ct. 2418 (1990) presented an excellent analysis of the history and relationship of State National Guard organizations to the Federal Armed Forces. Perpich, supra is a case in which the Minnesota Governor challenged the constitutionality of the Defense Department's deployment of part of that State's National Guard to Central America for training purposes.... Justice Stevens, for a unanimous Court, described the nature of "dual enlistment" that has been in effect since 1933 and explained that there are two distinctly separate entities that are the State's Armed Forces and the "Reserve Corps" of the federal Armed Forces. As Justice Stevens explained, members of the States armed forces retain their status as members of a State National Guard until they are ordered to active federal service and as soon as they are ordered to federal service members are "...relieved of his or her status in the State Guard for the entire period of federal service." (Perpich at 110 S.Ct. 2418, 2425-2426). Justice Stevens relied upon an Illinois Supreme Court's description of the "militia" in Dune v. people, 94 Ill. 120 (1879), to describe the separate and distinct roles that members of the State military establishment fill:

"In a sense, all of them now must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat

--only one of which is worn at any particular time (emphasis added) (Perpich at 110 S.Ct. 2418, 2427

The Appellees try to argue that the "state militia hat" and the "army hat" are the same. They attempt to homogenize the term "militia" and vest federal authority in the State created office of the Adjutant General; (MCL 32.700 (add. B, pgs. 22-23)), whose authority, by definition of the Michigan Legislature, is confined solely to the State's "military establishment." It is uncontested that Stump (TAG), and Taylor (ATAG), are Michigan employees. Stump argues that he derives his authority to control AGR program members from NGR 600-5 (Add. B, pgs. 63-91), a Department of the Army regulation published by the Federal National Guard Bureau...There is no dispute that that federal regulation tasks the State Adjutant General for "advise, plan, implement, and report (paragraph 1-4, NGR 600-5, Add. B, pg. 65) as well as to direct the process for selection of persons for federal service and makes that State official the "final separation authority" for those persons called to federal service under 32 U.S.C. 502(f) (see paragraph 6-1, NGR 600-5, add. B, pg.77). Clearly the scheme within that Federal regulation conflicts with the teachings of Printz and New York, supra. A State appointed employee, serving at the pleasure of the Governor, is not only tasked by that Federal regulation to administer and enforce the Federal AGR program but also is vested supposedly with the ultimate power to terminate persons federalized by Order of the Secretary of the Army. That regulation cannot stand Constitutional muster.

There is no dispute that the National Guard of the United States is defined as a "reserve component of the Army" (32U.S.C. 101 (5), Add. B, pg. 51 and 10 U.S.C. 101(C)(3), Add. B, pg. 44). Likewise, there is no dispute that "Active Guard/Reserve" duty is nowhere defined in Title 32 National Guard and is defined at 10 U.S.C. 101(d)(6)(A) (Add. B, pg. 45) as being for the purpose of "organizing, administering, recruiting, instructing, or training the reserve components (emphasis added)." ....10 U.S.C. 101(d)(6)(A) (ADD. B, pg. 45) (did) not specify "for the purpose of...the National Guard" which is defined in federal law as the

"organized militia" of the several States? The answer is Congress never intended to wrest from the President, as the Appellees argue, control of members of the Reserve Components of the U.S. Army. The constitutional effect would have been the same as placing control of the 82nd Airborne Division in the Governor of North Carolina. The Appellee' arguments are frivolous. The Appellees will argue as well, just as the United States did in New York, supra that Congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify State submission. Justice O'Connor answered:

> "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents (New York at 112 S.Ct. 2408, 2429)."

> "The Constitution does not protect the sovereignty of States for the benefit of the States or State governments as abstract political entities, or even for the benefits of public officials governing the States. To the contrary the Constitution divides authority between Federal and State governments for the protection of the individuals...Where Congress exceeds its authority relative to the states, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials."

Not even the president's consent to a statute that causes an infringement of the Presidential powers of appointment through the President's signing of it into law is permissible under the separation of powers doctrine (New York at 112 S.Ct. 2408 2431).

The statute codified at 32 U.S.C. 502(f) (Add. B, pg. 62) was enacted by Congress and was signed into law by the president. It vests in the Federal Secretary of the Army, not a State Governor or a State Adjutant General, the authority to call a member of a State National Guard to paid or unpaid Federal duty. The Secretary of the Army has no authority to direct any matter in the State's "organized militia." That Federal official acts only in the federal

capacity to federalize members of a State National Guard to serve in the Reserve Components of the U.S. Army. As soon as he or she so acts, the State and its officials lose control of that federalized person (32 U.S.C. 325, Add. B, pg 58).

Just as Printz, supra (117 S.Ct. 2365, 2378), the central issue in this appeal is the constitutionality of a federal statute, and promulgating regulations that vest in a State official federal power. This is an issue of the separation and equilibration of powers between the three branches of the Federal Government itself. The President is charged under the Federal Constitution with the responsibility to administer the laws enacted by Congress personally or through officers whom he appoints (Article II Section 2 and 3). A State Governor, not the President appoints a State Adjutant General. The State Adjutant General serves at the pleasure of the Governor, not the President. The smoke screen about "federal recognition" cannot obscure the underlying fact that there is no equivalent Adjutant General position within the Federal Armed Forces. The Governor and the Adjutant General have authority over State "organized militia" members only -- persons wearing their "state militia hat" (Perpich, supra). When they wear their "army hat" (Perpich at 110 S.Ct. 2418, 2427), they answer to the President and the Service Secretaries that the president appoint, not the Governor or Adjutant General.

NGR 600-5 cannot stand constitutional muster after New York and Printz. Stump and Taylor had no legal authority under which to act against Sergeant Hoffman. To the extent that 32 U.S.C. 502(f) vests in a State Adjutant General authority to control persons in full-time National Guard duty, in particular those in AGR status, it too cannot stand constitutional muster. This is a legitimate case and controversy that should not have been dismissed pursuant to FRCP 12(b)(6).

ISSUE III: Whether a challenge to the constitutionality of a scheme whereby State officials enforce a regulatory program is justicable as a matter of law.

The trial court concluded that Sergeant Hoffman's claims were non-justiciable because of the "application of the general rule that a court should typically decline to hear lawsuits involving personnel actions integrally related to the military's unique structure," citing Mier v. Owens, 57 F.3d 747, 749 (9th Cir. 1995) cert. den sub nom, Mier v. Van Dyke, 116 S.Ct 1317 (1996)....The trial court opined that there is no legal distinction between the State "military" and the Federal armed forces contrary to Perpich, supra and to Michigan law (MCL 32.505(a), Add. B, pg. 15) which defines "military" narrowly as "all components of the state military establishment." ....The Mindes court, Mindes v. Seaman, 453 F.2d 197 (5th Cir. 19710), federal courts may review matters of internal military affairs to determine if an official has acted out side the scope of his powers, if military officials have violated their own regulations, or if the constitutionality of military statutes, executive orders, and/or regulations are in question.

All of the National Guard cases address justiciability but do not consider the constitutional distinctions between the separate militias of the dual sovereigns or the constitutional infirmity of abrogating the exclusive powers of the President. The Adjutant Generals in those cases, all attempt to clothe themselves in federal robes (just as Stump and Taylor try to do in this case) when in fact their legal authority extends no further than the State's "organized militia." The Supreme Court held that in New York, supra, that Congress cannot compel States to enact or enforce a federal regulatory program. Printz, supra, simply expanded that prohibition by holding that Congress cannot conscript State officers directly. That is precisely what NGR 600-5 attempts to do. That regulation must be deemed unconstitutional under both New York and Printz, supra. Such a constitutional challenge is always justiciable.

This is not simply a "personal action integrally related to the military's unique structure" as the trial court inferred; this case instead challenges the very scheme whereby a State employee who reports to the Governor, as his Commander-in-Chief, under authority exclusively granted by State statute, is allowed to exercise

unbridled control over Federal military members. Whether a State Adjutant General acted outside the scope of his powers or violated State civil rights laws or the federal or Michigan Constitution requires no military law or procedure -- the issue is embodied in State law and the teachings of Printz, supra -- that issue is justiciable under Mindes, supra.

ISSUE IV: Whether the trial court erred as a matter of law by dismissing with prejudice the Complaint in this matter pursuant to Federal Rule of Civil Procedure 12(b)(6) when the causes of action pled and the issues presented concern complex issues of Michigan law not decided by any Michigan Appellate Court.

A complaint should not be dismissed unless it appears that plaintiff can prove no set of facts in support of his claim that would entitle him to relief (Mayer, supra and Cameron v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994). The court considering a motion to dismiss must accept all allegations contained in the Complaint as true (Wright, supra). On a motion to dismiss for failure to state a claim, if the court considers matters outside the pleadings, the motion shall be treated as one for summary judgment and all parties shall be given a reasonable opportunity to present material pertinent to a summary judgment motion (Briggs v. Ohio Elections Com'n., 61 F.3d 487 (6th Cir,. 1995)) -- that did not happen in this case.

ISSUES V: Whether the trial court erred as a matter of law by ignoring the State statutory jurisdictional perquisites imposed by the Michigan Code of Military Justice.

The pleadings reflect that Sergeant Hoffman was administered punishment under the provisions (MCL 32.1015, Add. B, pgs. 29-32) of the Michigan Code of Military Justice (MCL 32.1001 et seq) and headquarters, Michigan Army National Guard Regulation 27-1. The trial court did not even acknowledge the very important jurisdictional issues related to the Michigan Code and erroneously contended that Sergeant Hoffman was disciplined under federal law

and specifically "ANGR (sic) 600-5." Factually those trial court determinations are clearly erroneous and indicate that the court did not accept the allegations in the pleadings as being true (see R2, Exhibit A to Defendants' Motion to Dismiss or Change of Venue, Add. A, pgs. and Section 1015 (MCL32. 1015, Add. B, pgs. 29-32).

Sergeant Hoffman was never charged under the Michigan penal code (MCL 750.1 et seq) for any criminal offense -- the wallet incident was never even reported to civilian police authorities. The limited jurisdiction provisions of the Michigan Code of Military Justice are analogous but unique different than those of the Federal Code of Military Justice (10 U.S.C. 817, Add. B, pg. 47); in the federal sphere if there is no jurisdiction under the Code, any judgment arising under that Code is a nullity and wholly void(Malow v. U.S., 161 Ct.Cl (1963)).

Sergeant Hoffman's pleadings stated a cause of action. On de novo review, Sergeant Hoffman seeks a reversal and a remand with instructions to the trial court to remand to the State court causes of action to that applicable State Circuit Court....

ISSUE VI: Whether a trial court can legally consider claims seeking a Writ of Mandamus and/or Declaratory relief under Michigan law.

The trial court decided summarily that Sergeant Hoffman could not state a claim under the Michigan Constitution but did not address the issue of whether that Federal court can even entertain, under 28 U.S.C. 1367, a State action at equity that defines specific Michigan courts as having exclusive jurisdiction of the action. A federal court has no general jurisdiction to issue Writs of Mandamus (Haggard v. State of Tennessee, 421 F.2d 1384 (6th Cir. 1970)). Federal courts can issue writs in the nature of mandamus in aid of their respective jurisdictions not withstanding that 28 U.S.C. 1651 and FRCP 81(b) abolish the Writ of Mandamus in federal courts (Haggard, supra). By Michigan law, a Writ of Mandamus even if stated in a request

for declaratory relief is a mandate to a State official to perform their duties (Ferency v. Secretary of State, 139 Mich. App. 677, 362 NW2d (1984)). The trial court had no jurisdiction to act on this part of the complaint and should have remanded at least this portion of Sergeant Hoffman's Complaint for consideration by the appropriate State court. Michigan law -- the military Act and Code of Military Justice -- mandates the authority of the Michigan Adjutant General and when that State official is exceeding that authority, a Writ of Mandamus is a proper remedy. It was an abuse of discretion to not even consider the mandamus issue before dismissing it with prejudice under FRCP 12(b)(6). Sergeant Hoffman seeks an Order of this Honorable Court that the Judgment Order of the trial court be reversed and set aside and the matter be remanded to that Court with instructions to remand to the State Circuit Court.

> **ISSUE VII**: Whether the trial court erred as a matter of law by dismissing Sergeant Hoffman's claims brought under the Michigan administrative procedures Act when the Michigan regulation employed to administer non-judicial punishment upon him was not properly published under the Act as required by Michigan Code of Military Justice and the Act provides that such a regulation improperly published is invalid.

The trial court, contrary to the allegations in sergeant Hoffman's Complaint, and contrary to fact, concluded that Stump and Taylor acted to discipline him under federal law. Stump and Taylor ruined Sergeant Hoffman's federal military career. They did so under State, not federal law (MCL 32.1015, Add. B, pgs. 29-32). They did so when there was no jurisdiction under the Michigan Code and employed an internally published regulation promulgated improperly under the Michigan APA and its public notice/hearing requirements.

The Department of Military Affairs and the State Adjutant General have not complied with the Michigan APA to publish an "administration of Military Justice" regulation. ...A rule that does

not comply with the procedural requirements of the APA is invalid under State law (Detroit Base Coalition for human Rights of Handicapped v. Dept. of Social Service, 431 Mich. 172, 428 NW2d 325 (1988)).

This cause of action should not have been dismissed under FRCP 12(b)(6). Sergeant Hoffman seeks upon de novo review by this Honorable Court a reversal of the District Court's Judgment Order and remand to the trial court with instructions to remand the matter to the State Circuit court.

REASONS FOR GRANTING THIS PETITION

On the battlefield removing the dead and providing aid to the wounded soldiers is the most empirically agreed upon rule in warfare. Soldiers Know there are fatalities. Soldiers know some wounds never heal. Soldiers know some memories never fade. There is something almost magical in that by executing this rule of warfare soldiers are willing to invest and sometimes sacrifice their being, taking tremendous risks to contribute to the cause. Likewise on a daily basis, we encounter many psychological battlefields. Soldiers know at times nothing can be done. Soldiers know some feeling never heal. Soldiers know somethings can not be forgotten. When soldiers are maimed on the psychological battlefield you may not remove a body or bandage a wound, but rather you restore their dignity in order that they invest, sacrifice, and contribute to the good of the group. The most potent medicine for restoring dignity is due process. At this time in history, the spirit of the American fighting man appears depleted. It is not due to a tangible enemy, but rather an intangible battlefield where dignity is being denied. This is the Supreme Courts opportunity to make an extraordinary contribution to justice by restoring the intent of due process and the legitimizing of the Military Codes of Justice. Every soldier in uniform benefits.

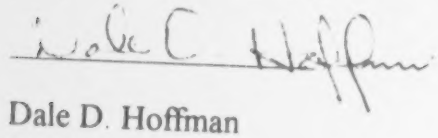
CONCLUSION

This court can clear the path so those whom wish to petition their government for wrongs may do. First, define the National Guard as either in a State status or Federal status. It is incongruent with our system of laws and judicial process to be both at the same time. Not only is it unconstitutional, but it serves no purpose other than to serve as a craterous loop hole for malicious conduct of senior State officials. Secondly, allow National Guard soldiers challenging State law to be allowed their day in court within the State Courts or open the channels of redress to the Federal military. It is fundamentally unfair for the State to claim federal powers and then assert federal immunity, but yet not allow any channels of redress to the Federal military. Third, the court should rebuke the process of feigning disciplinary charges to obstruct the due administration of justice. The degree of gullibility of the lower courts in the matter is deplorable.

The Supreme Courts interjection into the matter will impede the growing usage of military disciplinary code as a tool of malicious intent to burden subordinates. The sentiment among average soldiers, originating with the military draw down, and with sufficient examples, is that without cause or reason at any moment they can be offered up as a sacrifices to appease the generals under a masquerade of disciplinary conduct.

When a standard is broken and you do nothing, you've set a new standard. The standards broken here are many and cannot be left as precedence for the next attack of dark spirited politics. These standards of individual rights and liberties, MG Stump and BG Taylor kick aside and ignore without explanation or even a hint of embarrassment, as if unaware of the tremendous price that borne such freedoms. At personal issue is not that I choose to fight the matter, but rather who am I to surrender these freedoms?

Respectfully Submitted,



Dale D. Hoffman
841 Lakeview Ave.
Port Huron, MI 48060
(810) 984-3768

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 97-2177

Filed Dec 2, 1998

BEFORE: NELSON, CLAY & GIBSON*, Circuit Judges.

Clay, Circuit Judge, Appellant, Dale Hoffman, appeals from the order dismissing his claims challenging the constitutionality of the Michigan National Guard disciplinary regime, and his claims that National Guard officials violated his rights under the Michigan Administrative Procedures Act ("MAPA"), M.C.L. 24.203 (1988), the Elliot Larsen Civil Rights Act, M.C.L. 37.2303 (1977), and the Michigan Code of Military Justice ("MCMJ"), M.C.L. 32.1003 et seq. (1980). Appellant claims that the district court erred when it exercised his claims were not justiciable. Appellant also alleges that the district court erred when it exercised supplemental jurisdiction over his claims. For the reasons provided below, we hold that the district court properly invoked jurisdiction over and dismissed Appellant's claims and therefore we AFFIRM the decision of the district court.

I. BACKGROUND

Appellant, Dale Hoffman, was a member of the United States National Guard (hereinafter federal National Guard) and the Michigan National Guard (hereinafter state National Guard). (note 2) Appellant was a recruiter for the National Guard and was on federal National Guard duty, (note 3) pursuant to 32 U.S.C. 502(f) (1956), at the time of the incident that gave rise to his claim. Appellant was also an Eagle Scout troop leader during this period, as part of a National Guard program.

During a weekend Eagle Scout camping trip, Appellant and his troop members found a wallet. Appellant returned the wallet to the post office without any money in it. Active Guard Reserve

APPENDIX A

("AGR") officials, Gregory Johnson and Danny Jore, representatives of the federal National Guard, conducted an investigation of the incident when they heard that some of the troop members claimed that the wallet had money inside of it when it was discovered. During the course of their investigation, the AGR officials met with several boys in the troop who claimed the wallet had money inside of it when the wallet was found. The boys further alleged that Appellant split the money in the wallet with them before he returned the wallet. Prior to the investigation, the AGR officials told Appellant not to contact his troop members during the incident; however, during the investigation they discovered that Appellant had contacted several of the troop members. Appellant alleges that, prior to the investigation, the AGR officials told him they intended to replace him with a black recruiter. Appellant filed charges with the EEOC and contacted his Congressman, complaining about the AGR officials' alleged discriminatory comments.

At the close of their investigation, the AGR investigators recommended that Appellant be disciplined under federal National Guard regulation ANGR 600-5 for "inappropriate handling of a situation" and "for disobeying a lawful order." These two charges are actually part of the MCMJ, however, ANGR 600-5 provides that the Adjutant General must discipline National Guardsmen on federal duty status in the state of Michigan under the provisions in the MCMJ.

Appellant elected to accept non-judicial punishment for his pending charges and forgo a military court martial. Assistant Adjutant General ("AAG"), Robert Taylor imposed sentence on Defendant, assigning him a $2,000 fine and a one level reduction in rank for his position in the state National Guard. Appellant voluntarily withdrew his EEOC complaint during this period. He also voluntarily resigned from the federal National Guard, in order to avoid having a "separation for cause" imposed upon him, pursuant to ANGR 600-5. Appellant appealed AAG Taylor's

decision to the Adjutant General, ("AG"), E. Gordon Stump, and his appeal was denied.

II. PROCEDURAL HISTORY

On August 8, 1996, Appellant brought various federal and state claims in Michigan state court challenging the AG's disciplinary decision and requesting injunctive and declaratory relief. Appellant raised claims alleging that the AG violated his right to due process and his right to equal protection of the law under the Michigan Constitution and the United State Constitution. He further alleged that the AG violated the MAPA and the MCMJ when the AG imposed punishment on him. Appellant also brought claims under the Elliot Larsen Civil Rights Act and 42 U.S.C. 1983, 1985(3) and 1986, alleging that the AGR officials discriminated against him.

Appellees filed a motion to remove Appellant's case to a federal district court on September 6, 1996, and ultimately, their request was granted. After the district court on September 6, 1996, and ultimately, their request was granted. After the district court issued an decision adverse to Appellant in a case raising similiar issues, see Bradley v. Stump, 971 F. Supp. 1149 (W.D. Mich. 1977), Appellant deleted all federal causes of action from his complaint and moved to have his state law claims remanded to state court. The district court denied Appellant's motion, explaining that the federal court still had jurisdiction over Appellant's state law claims because they raised a federal issue, that is, whether National Guardsmen on federal duty were being disciplined by state officials in violation of the Constitution.

On September 22, 1997, the district court, without hearing or notice, issued a ruling dismissing Appellant's claim as non-justiciable because they challenged an internal military discipline decision.

In the current appeal, Appellant has revived his federal claims. Specifically, Appellant claims that the National Guard's disciplinary

regime was construed in violation the constitutional principle of dual sovereignty, as explained in Printz v. United States, --U.S.--, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1977), because the regime burdens a state official, the Adjutant General, with the responsibility of enforcing a federal regulatory program, that is, the discipline of federal officers. Appellant also alleges that the National Guard disciplinary regime violates the Constitutional provisions allocating authority to the President to control the armed forces because it gives the state the authority to discipline National Guard members of federal duty status. (note 4) See U.S. CONST. art. II. 2 cl. Appellant further claims that the district court erred when it determined that his challenges to the National Guard's disciplinary regime were not justiciable.

Appellant also attempts to revive his state law claims. He argues that the district court abused its discretion when it exercised supplemental jurisdiction over his state law claims because the district court did not have proper jurisdiction over his state claims because the claims raised complex state law issues and therefore should have been remanded to the state court. Lastly, Appellant challenges the district court's decision providing that, because his state law claims challenged an internal military discipline decision, they were not justiciable.

III. DISCUSSION

Appellant argues that the district court erred when it dismissed his constitutional challenges to the National Guard disciplinary regime on the grounds that because Appellant's arguments attacked the National Guard's intra military disciplinary decision, they were not justiciable. We find that the court properly dismissed his claims.

We review de novo the district court's decision to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. See In re Delorean Motor Corp., 991 F.2d 1236, 1239 (6th Cir. 1993). We "construe the complaint in the light most

favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Id. at 1240 (internal citations omitted). A complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (quoting Lawler v. Marshall, 898 F.2d 1196, 1199 (6th Cir. 1990). A judge may not dismiss an action under rule 12(b)(6) because he disbelieves the factual allegations in a complaint; however, we require the complaint to offer more than a "bare assertion of {its} legal conclusions." Id. (citing Scheid v. Fanny Farmer Candy Shops, Inc., 859 F2d 434, 436 (6th Cir.1988)). "in practice, a...complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Id. (internal citations omitted).

We review all de novo claims dismissed on justiciability grounds. National Rifle Association v. Magaw, 132 F.3d 272, 278 (6th Cir. 1977) (citing Kelly v. Selin, 42F3d 1501, 1507 (6th Cir. 1995). Our analysis of a claim's justiciability helps us remain within the federal court's grant of power under Article III of the Constitution, which limits the federal courts to adjudicating actual 'cases' and 'controversies.' Id. at 279 (discussing U.S. Const. art. III 2). To determine whether a claim is justiciable, we ask whether the federal court has the judicial power to entertain the suit, see id. (citing Warth v. Seldain, 422 U.S. 490, 498, 95 S.Ct. 2197 (1975)), keeping in mind that the judiciary's role is confined "to a role consistent with a system of separate powers" and its purpose is to address disputes "which are traditionally thought to be capable of resolution through the judicial process." Id. (citing Flast v. Cohen, 392 U.S. 83, 97, 88 S. Ct. 1942, 1951 (1968)). Indeed, "the 'case or controversy' requirement of Article III defines, with respect to the Judicial Branch, the idea of separation of powers on which the Federal Government is founded." Id. (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U. S. 464, 471-76, 102 S.Ct. 752, 757-61 (1982)).

Appellant's claims must be reviewed in light of the Supreme Court precedent establishing that intra military disciplinary matters are not justiciable. The Supreme Court consistently has held that federal courts cannot review internal military discipline disputes because these disputes require the courts to interfere with Congress's authority to regulate the military. See e.g. united States v. Chappell, 462 U.S. 296, 103 S.Ct 2365 (1983) (discussing U.S. CONST. art. 1 8 cls. 15, 16); Feres v. United States, 340 U.S. 13, 71 S.Ct. 153 (1949). Congress's authority to regulate the military must be treated with deference for "Congress, {is} the constitutionally authorized source of authority over the military system of justice." Chappell, 496 U.S. at 300. Therefore, "{a}ny action to provide a judicial response by way of such a remedy {for internal military discipline disputes} would be plainly inconsistent with Congress's authority in this field." Id. The Court explains that "{t}he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion{;} no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." Id.

Notably since Chappell, this Court has dismissed officers' federal claims when the officers challenge internal military disciplinary or personnel decisions. (note 5) See, e.g., Leistiko v. Stone, 134 F.3d 817 (6th Cir. 1998) (dismissing federal due process claim); Bradley v. Stump, 149 F.3d 1182, 1998 Wl 385903 (6th Cir. July 1, 1998) (unpublished Printz challenge) (Hereinafter Bradley II) (note 6), Shaffer v. West, 145 F.3d 1333, 1988 WL 228166 (6th Cir. May 1, 1998) (dismissing claim under 42U.S.C. 1983).

Appellant does not dispute the fact that his federal claims require this Court to review an internal military discipline decision. indeed, his federal claims attack the very heart of the National Guard's internal military discipline structure, alleging that Congress has created an unconstitutional scheme for resolving National

Guard disciplinary disputes. Specifically, Appellant asks the court to rule that Congress violated the Constitution when it gave the AG and the AAG authority to administer punishment to National Guardsmen on federal duty. (note 7) Given the Court's ruling in Chappell we cannot rule a matter that requires us to challenge Congress's authority to regulate internal military discipline. Appellant has failed to present any grounds on which his claim could be distinguished from our prior cases establishing that these kinds of issues are not justiciable. See United States v. Stanley, 483 U. S. 669, 683-84, 107 S.Ct. 3054 (1987) (noting that Chappell only requires that courts abstain from reviewing internal military disputes when there it is clear that Congress occupies the field in a subject area and the dispute involves an issue central to the military's operations). Therefore we conclude that the district court correctly dismissed Appellant's federal claims.

B. State Law Claims

1. Federal Jurisdiction over State Law Claims

Appellant argues that the district court erred when it exercised supplemental jurisdiction over his claims under MAPA, the Elliot Larsen Civil Rights Act, and the MCMJ. We disagree.

We review the district court's decision to exercise supplemental jurisdiction over a state law claim for abuse of discretion. Green v. Nevers, 111 F.3d 1295, 1299 (6th Cir 1997).

28 U.S.C. 1367(a), gives the federal courts power to exercise supplemental jurisdiction over the state law claims in an action when the federal court has original jurisdiction over the claims in the action and the companion state law claims in the action "form part of the same case or controversy." City of Chicago v. International Bd. of Surgeons, -- U.S. --, 118 S.Ct. 432, 525 (1997). The district courts' original jurisdiction covers cases "arising under the Constitution, laws, or treaties of the United States, "28 U.S.C. 1331 (1980). A complaint falls within the

district court's original jurisdictional jurisdiction when the party's "well-pleaded complaint raises issues of federal law." City of Chicago, 118 S.Ct. at 525. Once we establish that the district court had a basis for original jurisdiction, "the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction,...{namely} whether they satisfy 1367(a)'s requirements." Id.

It is clear that the district court had a proper basis for original jurisdiction in this case, as Appellant's constitutional challenges to the National Guard's disciplinary regime were federal questions. The only remaining question was whether Appellant's state law claims were part of the same constitutional "case or controversy." We find that these claims were part of the same case Appellant's MAPA, Elliot Larsen, and MCMJ claims all arose from a common nucleus of operative fact' such that "the relationship between the {federal} claim{s} and the state claim{s} permits the conclusion that the entire action before the court constitutes one constitutional case." City of Chicago, U.S., 118 S.Ct. 523, 529 (1997) (quoting Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (196600. Appellant's MAPA and MCMJ claims were directly related to his federal challenges to the National Guard's disciplinary regime because they concerned the same disciplinary action that was the basis for his federal claim. Additionally, Appellant's Elliot Larsen Civil Rights also concerned the same disciplinary actions, because he alleged that the AGR officials conducting the investigation of his discipline charge violated his civil rights.

Appellant notes that 28 U.S.C. 1367(b) gives the district court discretion to decline to exercise supplemental jurisdiction when an action presents complex issues of state law. however, we find that the state law claims in Appellant's action did not present complex state law questions. Rather, as explained in more detail below, the court was able to identify clear statutory and precedential authority that barred Appellant's claims. See Coffman v. Michigan, 120 F.3d 57, 58 (6th Cir. 1997) (noting that state law remedies are not available to service members challenging internal military discipline

decisions); see also M.C.L. 32.503 (establishing that state laws are not to be construed in a manner that conflicts with federal law establishing the National Guard).

Appellant also argues that the district court did not have the power to issue a writ of mandamus compelling a state officer to enforce state law, the specific relief he requested, and therefore the court should not have exercised supplemental jurisdiction over his state law claims. (note 8) We disagree.

28 U.S.C. 1651 provides that the federal courts may issue all writs necessary to enforce the law in their respective jurisdictions, including writs of mandamus. See Haggard v.Tennesse, 421 F.2d 1384, 1385 (6th Cir. 1970). However, federal courts may not issue writs of mandamus to compel state officers to act in accordance with state law. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (establishing that the 11th Amendment bars federal courts from using the writ of mandamus to compel state officers to conduct their duties under state law); 28 U.S.C. 1361 (1962) (establishing that federal courts have the power of mandamus over federal officials). Although the federal court may not compel a state official to enforce rights protected by federal law. See generally, CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Benjamin v. Macolm, 803 F.2d 46(2d Cir. 1986)

The district court in this case did have the power to issue the mandamus Appellant requested because the AAG and the AG are hybrid federal and state officials, and therefore the federal court may exercise mandamus power over them. See Bowen v. Oistead, 125 F.3d 800, 802 (9th Cir. 1997)(recognizing the hybrid federal-state nature of the AG),Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 767 (7th Cir. 1993)(same); Bradley v. Stump, 971 F. Supp. 1149 (W.D. Mich. 1997)(same), cf. Perpich v. Department of Defense, 496 U.S. 334, 347, 110 S.Ct. 2418, 2426 (1990)(recognizing that the dual system of the federal and state national guard program remains unchallenged); cf. Schultz v. Wellman, 717 F.2d 30(6th Cir. 1983)(advocating a case-by-case

inquiry into whether the AG acts as a federal or state official in each dispute). Additionally, we note that, even if we determined that the AG was acting as a state official in this instance, Appellant's claims were designed to vindicate federal rights under the Constitution, and therefore the court could have issued a mandamus compelling even state officials to protect his rights. Based on these findings, we conclude that the district court had the power to issue a writ of mandamus over the AG and his staff and therefore properly exercised his jurisdiction over the Appellant's state law claims.

In his final assignment of error, the Appellant contends the district court did not have jurisdiction to hear his appeal of the AG's disciplinary decision because his claim arose under the MCMJ, and therefore should have been referred to a military court. We disagree. The district court correctly determined that appellant was disciplined under ANGR 600-5, which provides that "separation authority for the ANGR {Army National Guard} soldiers on FTNGD {full time National Guard duty} in the AGR {Army National Guard Program}is the State Adjutants General, or when delegated{s} their primary staff. " The regulation also provides that National Guardsmen in each state are subject to the state code of military justice for their state. ANGR 600-5 therefore federalizes the state code when the code is used to discipline National Guard members on federal active duty. Therefore, we hold that the district court did have original jurisdiction to hear this claim as arising under ARNG 600-5, a claim under federal law.

2. Justiciability of State Law Claims

Appellant claims that the district court erred when it determined that his state law claims were not justiceable. We disagree.

We review the district court's decision to dismiss a claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim de novo. See In re Delorean Motor Corp., 991 F.2d 1236, 1239 (6th Cir. 1993). We also review de novo any claim that has been dismissed as a nonjusticiable question. See National Rifle Association v. Magaw,

132 F.3d 272, 278, (6th Cir. 1997)(citing Kelley v. Selin, 42 F.3d 1501, 1507 (6th Cir. 1995).

We hold that the Appellant's state law claims are not justiciable. Two sources of authority support our decision. The first is Coffman v. Michigan, 120 F.3d 57, 58 (6th Cir.1997), a case in which we held that state law remedies are not available to members who challenge internal military disciplinary decisions. The second is M.C.L. 32.503, which provides that state laws are not to be construed in a manner so as to interfere with the administrative operations of the National Guard. These sources of authority bar Appellant from bringing suit in federal court under the MAPA and the MCMJ to challenge the Adjutant General's disciplinary decision. See Bradley II, 149 F.3d 1182, 1998 WL 385903. Additionally, because the Appellant's claim under the Elliot Larsen Civil Rights Act alleges that the AGR officials who investigated his disciplinary infraction violated his civil rights, his claim also challenges an internal military disciplinary procedure, and therefore is not reviewable. Accordingly, we find that the district court correctly determined that Plaintiff's state law claims were not justiciable.

IV. CONCLUSION

For these reasons, we affirm the order of the district court dismissing Appellant's federal and state law claims challenging the structure of the National Guard's discipline regime.

FOOTNOTES

1. The Honorable John R. Gibson, Senior Circuit Judge, United States Court of appeals for the Eighth Circuit sitting by designation.

2. The National Guard is a dual federal and state program. A person interested in the federal National Guard first enlists in his state National Guard. See 32 U.S.C. 307(a)(1994). After he enlists in the state National Guard, the person applies for "federal recognition" in the federal National

Guard. 32 U.S.C. 307 (1994). The "federal recognition" in the federal National Guard 32 U.S.C. 307 (1994). The "federal recognition" system insures that the state National Guard members have a uniform level of qualifications before they enlist in the federal National Guard. Importantly, the state division of the National Guard can lose its federal funding if the federal National Guard determines that the state has not complied with the federal National Guard standards for training, equipping, and disciplining officers. See 32 U.S.C. 108 (1994). Although the state National Guard can allow a person to enlist only in the state National Guard, it is common for the person to enlist in both the federal National Guard.

3. A National Guard member is on "state active duty status" when he works under the authority of the governor and he is on "federal active duty status," when he works under the authority of Congress. The National Guard member works on state active duty status until he is called into active federal duty by Congress. See generally, Perpich v. Department of Defense, 496 U.S. 334, 110 S. Ct. 2418 (1990).

4. When National Guard members are on "active federal duty status" they are part of the United States Army.

5. Other courts have taken a more case specific approach to determining whether an internal military discipline matter is justiciable. See Hupp v. United States 144 F.3d 1144, 1146 (8th Cir. 1998) (holding that only military decisions concerning hiring, firing and transfer are not justiciable); Mier v. Owens, 57 F.3d 747, 749, (9th Cir. 1995) (same). We similarly adopted a more nuanced position prior to the Supreme Court's decision in Chappell. See Schultz, 717 F.2d at 304.

6. At oral argument Appellant attempted to distinguish his case from Bradley II by arguing that he was on federal active guard duty status when he was disciplined and the appellant in Bradley II was on state active guard status when he was terminated. The

distinction lays at the heart of Appellant's Printz claim, that he is a federal officer who was disciplined by a state officer, and the federal government cannot cede the responsibility for disciplining federal officers to state officials. Because this claim requires review inquiry into internal military disciplinary matters, and this area is within Congress's authority, we decline to review Appellant's claim.

7. We note that the militia Clauses in the Constitution addresses the substance of Appellant claims because they establish that Congress has the authority to establish the disciplinary structure it deems appropriate for the state militias. Specifically, the Militia Clauses in the Constitution provide that "The Congress shall have power....

"to provide for calling forth the Militia to execute the Laws of the Union, to suppress Insurrections and repel Invasions; {and t}o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Services of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. Art 1, 8, cls. 15, 16.

8. We hold that "the writ of mandamus as such has been abolished" under Fed. R. Civ. P. 81(b); "{h}owever, under 28 U.S.C. 1651 (All Writs Statute) federal courts may issue all writs in aid of their respective jurisdiction, including writs in the nature of mandamus." Haggard, 421 F.2d at 1385 (6th Cir. 1970).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
No. 1:97-CV-266

Dated: October 14, 1997

OPINION OF THE COURT

Now before the Court is defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1), (3), and (6). For the reasons stated below, the court finds that plaintiff has failed to state a claim upon which relief can be granted and, therefore, his complaint will be dismissed pursuant to Rule 12 (b) (6).

I. Factual Background

Plaintiff Dale Hoffman served as a member of the National Guard of the United States and the Michigan National Guard. On the dates of the incidents giving rise to this action, Plaintiff was serving as a recruiter for the Active Guard Reserve program ("AGR") in active federal status pursuant to 32 U.S.C. 502 (f). Plaintiff also served off-duty as a leader of a Boy Scouts of America Explorer Post. During a weekend outing, several scouts found a wallet that they turned over to Hoffman. Hoffman later turned in the wallet (which did not contain any money) to a local post office. Hoffman contends that there was no money in the wallet when the scouts gave it to him. His AGR superiors, defendants Jore and Johnson, learned of the incident and conducted an investigation. At various times, some of the scouts alleged that the wallet initially contained money and that Hoffman had shared the money with them. Hoffman was ordered not to contact the scouts involved, but he admitted to speaking with some of them by telephone following

the incident. Following the investigation, johnson recommended that Hoffman be disciplined pursuant to federal Army National Guard regulation ("ANGR") 600-5 for inappropriate handling of a situation and for disobeying a lawful order, both violations of the Michigan Code of Military Justice. Prior to the scouting incident, plaintiff alleges that Jore and Johnson had informed him they planned to replace him with a black recruiter. Hoffman complained to his Congressman and filed a complaint with the Equal Employment Opportunity Commission.

Hoffman chose to forego trial by court-martial and to accept non-judicial punishment for the scouting incident. Assistant Adjutant General Taylor ordered Hoffman to pay a $2000 fine and imposed a reduction of one rank on Hoffman. Hoffman thereupon voluntarily withdrew his E.E.O.C. complaint and voluntarily resigned from the AGR, apparently in lieu of having involuntary separation for cause imposed upon him. Hoffman appealed the decision to Adjutant General Stump and his appeal was denied. Plaintiff contends that the punishment administered to him as a result of the scouting incident was not authorized under Michigan law and that defendants lack authority to discipline him under federal law. Plaintiff further alleges that his punishment constituted unlawful retaliation for his having filed a discrimination charge against defendants.

II. Analysis

In his complaint, plaintiff challenges his separation from the AGR and the imposition of the $2000 fine on the grounds that these disciplinary measures were not authorized by Michigan law and constituted retaliatory discrimination under Michigan law. At its most basic level, therefore, plaintiff's suit is a challenge to the appropriateness of the military discipline imposed upon him by his superiors. Nevertheless, plaintiff in various places throughout his complaint and in his response to this motion attempts to frame the case as a facial challenge to

the statutes and regulations that make up the unique and complex infrastructure of the National Guard.

Because the justiciability of plaintiff's claims will turn in part on the nature of his claims, the Court here attempts to identify and describe each of those claims. In Count I, which lists only defendants Stump and Taylor, plaintiff seeks a declaratory judgment that the governor, state adjutant general, and his assistants have no authority under state law to control members of the National Guard of the United States, and that defendants Stump and Taylor acted outside the scope of their "State" offices such that they should be held individually liable. Plaintiff also seeks in Count I a writ of mandamus enjoining the defendants from exercising any authority "outside of the state's military establishment." Count II lists all the defendants and alleges due process and equal protection violations of the Michigan Constitution. Specifically, plaintiff seeks declaratory judgments in Count II that the defendants are state employees and therefore have no power to control federal AGR members, and that AGR members are not subject to the MCMJ unless they are on active state status. Additionally, plaintiff seeks reinstatement to his AGR position and to have his punishment set aside and voided. In Count III, plaintiff seeks a declaratory judgment "ordering and adjudging that any rule, regulation, or supplement to a Federal regulation published by the Department of Military Affairs that was published contrary to the provisions of the {State Administrative Procedures Act} is void under State law." The final count of plaintiff's complaint (labeled "Count V"), asserted against all of the individual defendants, alleges conspiracy to discriminate and retaliate under the Michigan Elliott-Larsen Civil Rights Act.

A. Fed. R. Civ. P. 12 (b) (6) Standard(note 1)

The Court must accept the allegations contained in the plaintiff's complaint as true. See Wright v. Metro Health Med. Ctr., 58 F.3d 1130, 1138 (6th Cir. 1995), cert. denied, 116

S.Ct. 1041 (1996). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Id. (quoting Cameron v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994)). "In considering a motion under Fed. R. Civ. P. 12 (b) (6), it is not the function of the court to weigh the evidence or evaluate the credibility of the witnesses, instead, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the Plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Id.

B. Justiciability

Although plaintiff attempts at length to frame his claims in a manner that would render them justiciable, plaintiff cannot escape application of the general rule that a court should typically "decline to hear lawsuits involving personnel actions integrally related to the military's unique structure." Mier v. Owens, 57 F.3d 747, 749 (9th Cir. 1995), cert. denied sub nom, Mier v. Van Dyke, 116 S. Ct. 1317 (1996). In Bradley v. Stump, 1997 WL 418438 (W.D. Mich. March 18, 1997), this court held that a National Guard technician's martial status discrimination claim presented a non-justiciable military controversy. Nevertheless, because the Sixth Circuit had not yet ruled on the justiciability of such claims, the Court analyzed each of plaintiff's claims on the merits and concluded that plaintiff had failed to state a claim upon which relief could be granted. See id. at *7.

Since this Court decided Bradley, the Sixth Circuit has addressed the issue of justiciability in the context of an intra-military personnel dispute. See Coffman v. State of Michigan, et al., 120 F.3d 57 (6th Cir. 1997). In Coffman, the court considered whether a former member of AGR could maintain an action against the Michigan National Guard for alleged

discrimination based upon a disability. The court affirmed the lower court's dismissal because none of the statutes relied upon by the plaintiff explicitly extended its remedies to members of the armed forces. See id., at 59. In reaching its holding, the Coffman court relied upon the Supreme Courts' reasoning in Chappell v. Wallace, 462 U.S. 296 (1983), in which '{t}he Court noted that Congress has plenary authority over the military, and has exercised that authority to establish statutes regulating military life and to provide for a comprehensive internal system of justice." Coffman, 120 F.3d at 59 (citing Chappell, 463 U.S. at 301-03). Absent explicit direction from Congress, reasoned the Coffman court, the judicial branch should refrain from interfering in the military's internal personnel matters. See id. Underlying and reinforcing this separation-of-powers rationale is the notion that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." Chappell, 462 U.S. at 300. Thus, "{c}ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." Id.

Applying the principle of deference to the military in personnel matters announced in Chappell and recently developed in Coffman and Bradley, the Court finds that plaintiff's suit here presents a non-justiciable military controversy. Despite plaintiff's efforts to frame his claims as facial challenges to the laws and regulations establishing the national Guard, his basic complaint is that the fine imposed upon him and his separation from the AGR were unfair and unauthorized. Plaintiff had an opportunity to raise these challenges within the military system of justice, but he chose to forego a trial by court-martial and to accept non-judicial punishment. It is true that "Personnel actions are not always

integrally related to the military's unique structure." Mier v. Owens, 57 F3d 747, 750 (9th Cir. 1995). In this case, however, plaintiff challenges the authority of his superiors to discipline him and the nature and content of the punishment actually imposed on him. This is precisely the kind of intra-military dispute for which the separate system of military justice was created, for "{t}he special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personnel liability at the hands of those they are charged to command." Chappell, 462 U.S. at 303-04.

The rule of deference established in Chappell applies in the context of state national guards, even if defendants are not "purely" federal officers in that some or all of their day-to-day responsibilities are governed by state law. See Bowen v. Oistead, 1997 WL 564568, at *3 (9th Cir. Sept. 12, 1997). The military non-justiciability doctrine has also been held to preclude federal court review of a plaintiff's state law claims. See Udell v. Adjutant General's Dep't of State of Texas, 878 F. Supp. 991 (S.D. Tex 1995) (holding that state claims concerning military personnel matters in a state national guard are non-justiciable in a federal forum). Courts have held that the Chappell non-justiciability doctrine bars claims for injunctive relief as well as claims for monetary damages. See Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1009 (8th Cir. 1989); Crawford v. Texas Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); but see Jordan v. Nat'l Guard Bureau, 799 F.2d 99, 110 (3d Cir. 1986). Thus, because all of plaintiff's claims stem from a non-justiciable controversy involving the appropriateness of the discipline imposed upon plaintiff by his military superiors, the Court finds that plaintiff's suit is not justiciable. Therefore, plaintiff has failed to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b) (6). However, because

plaintiff goes to such lengths to avoid this result by framing his claims as alleged facial challenges to the statutes and regulations establishing the National Guard and the Michigan National Guard, the Court will address briefly each of the plaintiff's claims. None of the allegations in plaintiff's complaint constitutes a claim upon which relief can be granted under Fed. R. Iv. P. 12 (b) (6).

c. Plaintiff's Claims

1. Constitutionality of Shared Federal and State Authority over National Guard

Plaintiff's strongest argument that his complaint alleges a justiciable controversy is that in Count I, he challenges the constitutionally of a federal regulation that vests authority in the state adjutant general and his assistants to control AGR members engaged in active federal service. (note 2) According to plaintiff, the "central issue" in this case is whether the state adjutant general and his appointed assistants may rely on a federal regulation, ANGR 600-5, to control and administer members of the AGR. In his response to defendants' motion to dismiss, plaintiff asserts that ANGR 600-5 is unconstitutional, relying almost entirely on the Supreme Court's recent decision in Printz v. United States, 117 S. Ct. 2365 (1997). In Printz, the Court held that the portion of the Brady Handgun Violence Prevention Act establishing an obligation to conduct background checks on prospective handgun purchasers imposed an unconstitutional obligation on state officers to execute federal laws. See id. at 1380. The Court's rationale was that the federal government may not compel the states to implement, by legislature or executive action, federal regulatory programs. See id.

It is not necessary for the Court to conduct a detailed analysis of Printz, however, because the facts of Printz are not sufficiently analogous to this case to render comparison

meaningful. Throughout the amended complaint, plaintiff demonstrates a fundamental misunderstanding of the uniquely hybrid character of the National Guard. Plaintiff repeatedly attempts to characterize all of the defendant National Guard members as solely "state officials." This Court recently explained the nature of the National Guard's hybrid status. See Bradley v. Stump, 1997 WL 418438, *12, n.13 (W.D. Mich. 1997); see also Bowen v. Oistead, 1997 WL 564568, *3 (9th Cir. Sept. 12, 1997) (stating that "the military apparatus of the United States cannot be divided into strictly state and federal components"); Knutson v. Wisconsin Air Nat'l Guard, 995 F. 2d 765, 767 (7th Cir. 1993) (noting that "{t}he {National} Guard occupies a distinct role in the federal structure that does not fit neatly within the scope of either state or national concerns"). For example, the position of adjutant general is created by federal law. See 32 U.S.C. 314. However, 314 also specifies that the adjutant general "shall perform the duties prescribed by the laws of that jurisdiction." From this general provision, plaintiff concludes that the adjutant general and his assistants derive their power and authority "exclusively" from state law. This conclusion defies the literal language of the statute and fails to recognize the concurrent federal and state authority under which the National Guard operates. For example, as defendants point out, a provision of the Michigan Military Act expressly provides (in relevant part):upon by the United States. M.C.L. 32.503

> It is the intent of the act and other acts of this state effecting the Michigan National Guard...to conform with applicable acts and regulations of the United States. The laws of this state shall be construed to effect this intent, and anything to the contrary shall be held to be null and void as long as the subject matter shall have been acted upon by the United States. M.C. L. 32.503

Thus the Michigan National Guard and the National Guard of the United States are not intended to be completely separate entities. Rather, the Michigan Guard that carriers out state functions when not called to engage in federal duty. Plaintiff was in active federal status at the time of the wallet incident that led to his punishment. However, the adjutant general and his assistant had authority under ANGR 600-5 to discipline plaintiff. Any suggestion that defendants lacked authority under state law to punish plaintiff must fail, for plaintiff was disciplined pursuant to federal law. Further, M.C.L. 32.503 renders null and void any state laws or regulations that conflict with ANGR 600-5.

Plaintiff's failure to grasp the hybrid status of the Michigan National Guard proves fatal to his constitutional claim. This is not a situation like that in Printz, in which federal law requires purely state and local officials to administer a federal regulatory scheme. Rather, the state adjutant general and his assistants have both federal and state authority. Consequently, the dynamic that was problematic in Printz, in which state officials are forced to follow a federal mandate, is not present in the infrastructure of the National Guard. Thus even if the allegations set forth in Count I of Plaintiff's complaint presented a justiciable controversy, which this Court has held it does not, plaintiff has failed to state a viable claim either based on constitutional theory or any other theory premised on allegations that defendants exceeded their "state " authority.

2. State Constitutional Claims

Plaintiff has failed to state a claim upon which relief can be granted under the Michigan Constitution. As this Court stated in Bradley v. Stump, 1997 WL 418438 (W.D. Mich. March 28, 1997), the Michigan Supreme Court has refused to recognize the right of individuals to sue the state for damages for violations of the state constitution. See id. at *11 (citing Smith

v. Department of Public Health, 428 Mich. 540, 631 (1987), aff'd sub nom, Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989)). While in this case the plaintiff seeks primarily injunctive relief in the form of declaratory judgments and reinstatement, plaintiff has cited no authority for the preposition that the state constitution provides a remedy for such claims. As defendants note, plaintiff chose to relinquish his claims under 42 U.S.C. 1983, 1985, and 1986; as these claims would have provided an alternative remedy, the Court finds that the plaintiff has not raised a proper claim under the state constitution. plaintiff argues that the analysis in Smith applies only to state officials' ability to assert immunity defenses, and that in this case the defendants may not raise such defenses because they were not acting within the scope of their authority. (note 3) For the reasons set forth above in relation to plaintiff's constitutional claims, the Court finds that the argument is without merit. Defendants had concurrent state and federal authority and, as such, they had the authority under ANGR 600-5 to impose discipline on plaintiff in relationship to the wallet incident. Therefore, plaintiff has failed to establish a viable state constitutional claim; he has shown neither that he has a right to challenge his punishment under the state constitution nor that the defendants' conduct violated any specific provision therein.

3. State Administrative Procedure Act Claim

Plaintiff has also failed to state a viable state claim under the Michigan Administrative Procedures Act, ("MAPA"), M.C.L. 24.201 et seq. In Count III of his amended complaint, plaintiff seeks relief against the Department of Military Affairs for promulgating "numerous regulations and/or supplements to Federal regulations related to personnel control" that do not conform with the provisions of MAPA. However, plaintiff lists only one such allegedly defective regulation, HQ MI ANG 111-1, and nowhere articulates in what way that or any other regulation is deficient. Rather, plaintiff simply urges this Court

to enter a judgment "holding , ordering and adjudging that any rule, regulation or supplement to a Federal regulation published by the Department of Military Affairs that was published contrary to the provisions of the MAPA is void under State law." Amended Complaint at 24. It is not the proper function of this court to conduct an exhaustive review of the Michigan military regulations to locate a basis for plaintiff's claim. Plaintiff must at least articulate what his grievance is under MAPA. Moreover, plaintiff's MAPA claim suffers from the same fatal defect as did the plaintiff's claim in Bradley v. Stump, 1997 WL 418438 (W.D. Mich March 18, 1997). As this Court state in Bradley, "{u}nder the Supremacy Clause to the U.S. Constitution, the actions of a military official acting pursuant to federal law...cannot be challenged on the grounds that the officer's actions also failed to comply with state law." Bradley, 1997 WL 418438, at *12. In Bradley, the defendant officials had acted pursuant to authority granted to them in the National Guard Technicians Act of 1968. Similarly, here, the defendant officials acted pursuant to the authority granted to them by federal regulation ANGR 600-5. Thus, assuming that plaintiff's MAPA claim derives from failure of the defendant officials to discipline him in accordance with MAPA requirements, plaintiff's claim fails because there is no requirement that the defendants' actions conform with state administrative law requirements.

4. Elliott-Larsen Civil Rights Claim

Plaintiff's final remaining claim alleges that defendants engaged in a conspiracy violative of the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"). Plaintiff alleges that the punishment administered to him for the wallet incident was the result of a conspiracy to replace him with a black recruiter and to retaliate against him for filing an E.E.O.C. complaint against them. Defendants argue that because plaintiff was on active federal duty status when the wallet incident occurred, as

plaintiff himself has consistently emphasized, he may not seek shelter under ELCRA. Defendants insist that plaintiff must seek relief under Title VII, and that courts have consistently ruled that Title VII does not provide a remedy for discrimination to members of the military. Plaintiff counters this argument by asserting that Title VII is not analogous, as it does not contain a provision equivalent to Article 3 of the ELCRA, the "public accommodations and services" clause. Plaintiff errs in grounding his discrimination claim in ELCRA's public accommodations and services clause. Article 3 provides in relevant part that "a person shall not...{d}eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public service because of religion, race, color, national origin, age, sex, or marital status..." M.C.L.A. 37.2302 (West 1985). Plaintiff contends that he has a valid claim under Article 3 because "he was denied the full and equal enjoyment of the privileges of public service because he was a white male and the Defendants openly attempted to sever his AGR status." Plaintiff's Response to Defendants' motion for Dismissal at 17. Plaintiff further argues that "public service" includes a state department or agency. Plaintiff misinterprets the scope and purpose of ELCRA's Article 3. Article 3 provides a remedy for persons who are denied public accommodations or services on the basis of, among other things, race. Even assuming that plaintiff's allegations were true, it simply does not make any sense to say that he was denied a "privilege" of a public service. Thus the Court need not decide whether, as defendants argue, the employment provisions of ELCRA, which does not provide a remedy for the kind of employment-based discrimination of which plaintiff complains. Therefore, plaintiff's ELCRA claim also fails to state a claim upon which relief can be granted. Moreover, the Sixth Circuit held in Coffman that a member of the military may not obtain relief under a state or federal statute that does not explicate extend its remedies to members of the armed forces. See Coffman v. State of Michigan, et al., 120

F.3d 57, 59 (1997). (note 4) Because ELCRA does not purport to extend its remedies to members of the armed forces, plaintiff has failed to state a claim upon which relief can be granted.

III. Conclusion

Having thus established that plaintiff's claims are either non-justiciable or, in the alternative, fail to establish valid constitutional or statutory claims, defendants' motion to dismiss under Fed. R Civ. P. 12 (b) (6) is granted. Plaintiff's complaint is dismissed with prejudice and judgment is awarded to defendants. An order consistent with this opinion shall issue forthwith.

DAVID W. MCKEAGUE

UNITED STATES DISTRICT JUDGE

FOOTNOTES:

1. Although defendants move to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(1), (3), and (6), the Court has determined that defendants' arguments are most appropriately termed rule 12(b) (6) challenges for failure to state a claim upon which relief can be granted. Accordingly, the Court will analyze defendants' motion as a motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b) (6).

2. It is difficult to discern the exact nature of plaintiff's claim in regard to Count I. In his amended complaint, plaintiff seeks a declaratory judgment that the governor, state adjutant general, and his assistants have no authority under state law to control members of the National Guard, and that defendants Stump and Taylor acted outside the scope of their offices. Plaintiff also seeks a writ of mandamus enjoining state officials from exercising any authority outside the state's military establishment. Perhaps because plaintiff was attempting to defeat federal removal jurisdiction when he amended his complaint, plaintiff only alludes in prefatory paragraphs to constitutional problems with the federal statutes and regulations governing operation of the National Guard. However, plaintiff's sole argument relating to Count 1 set forth in his response to defendants' motion to dismiss is that ANGR 600-5 is unconstitutional. Because plaintiff has focused on this argument, and because the rest of the allegations in Count I of the amended complaint are similarly resolved, the Court will address the constitutional issue.

3. Plaintiff also argues that defendants should be stripped of their official immunity because they were "reckless" in exceeding the bounds of their "state" authority and in imposing an allegedly excessive fine on plaintiff. As already noted, defendants did not exceed their authority in punishing plaintiff and whether the amount of his fine was appropriate is a matter of intra-military discipline that is not justiciable in this Court.

4. Although based on somewhat different reasoning, this ruling is in accordance with the ruling of several state courts that have considered whether a member of the armed services may assert claims under state discrimination laws. See Kolomick v. New York Air National Guard, 219 A.D.2d 367 (N.Y. 1996) (holding that state anti-discrimination law was preempted by federal national guard regulation providing for review of discrimination claims); Maine Human Rights Comm'n v. Maine Dep't of Defense and Veterans' Servs., 627 A.2d 1005 (Maine 1993) (construing state civil rights statute in accordance with Title VII and holding claim non-justiciable in federal forum); Hazelton v. State Personnel Comm'n, 505 N.W. 2d 793 (Wisc. Ct. App. 1993) (holding that plantiff could not maintain state discrimination claim because National Guard regulation